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95-651

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOANN BENTON AHMED, a/k/a Joe Gresham, as personal representative of the Estate of Jose L. Gresham,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; CSX TRANSPORTATION, INCORPORATED, a Virginia Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Personal Representative of
the Estate of Joe L. Gresham

30 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals has so far departed from the usual and accepted course of judicial proceedings in affirming the district court's entry of final summary judgment against Petitioner so as to call for an exercise of this court's power of supervision?

PARTIES TO THE PROCEEDING BELOW

The parties before the Court and to the proceedings below are:

1. Petitioner JOANN BENTON AHMED, as Personal Representative of the Estate of Joe L. Gresham.

2. Respondents NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; and CSX TRANSPORTATION, INCORPORATED, a Virginia Corporation.

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IN THE

Supreme Court of the United States

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No. _____

JOANN BENTON AHMED, a/k/a Joe Gresham, as personal representative of the Estate of Jose L. Gresham,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; CSX TRANSPORTATION, INCORPORATED, a Virginia Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners JOANN BENTON AHMED, a/k/a Joe Gresham, as personal representative of the Estate of Jose L. Gresham, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on June 27, 1995, affirming the decision of the District Court.

OPINIONS BELOW

The unreported Order of the Court of Appeals for the Fourth Circuit affirming the district court as well as the order denying Petitioner's Motion for Rehearing are reprinted in the Appendix hereto at 12a.

The unreported summary judgment of the United States District Court Columbia, South Carolina Division is reprinted in the Appendix hereto at 8a.

JURISDICTION

The Order of the Court of Appeal for the Fourth Circuit was entered on June 27, 1995. The motion for rehearing was denied on July 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

S.C. Ann. § 15-5-90 is the statutory provision involved and it provides:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

STATEMENT OF THE CASE

This case arises out of injuries suffered by Joe Gresham in a train derailment accident which occurred on July 31, 1991 in the State of South Carolina. The decedent, Joe L. Gresham, lingered twenty nine (29) days from date of the accident until

August 28, 1991, when he died from complications related to his injuries.

The District Court proceedings:

Suit was initially filed in Florida in a case styled *Joann Benton Ahmed, as Personal Representative of the Estate of Jose L. Gresham, a/k/a Joe Gresham, Plaintiff v. National Railroad Passenger Corporation (Amtrak) and CSX Transportation, Inc.*, Case No. 92-02088 (Fla. 17th Judicial Circuit, Broward County). That action was brought by the personal representative of the Estate of Joe Gresham to recover for the Estate those damages which accrued as a result of the death of Joe Gresham.

In that action, the parties entered into a Stipulation and Agreement in an effort to resolve the matter on an expedited basis. In pertinent part, the Stipulation and Agreement provided as follows:

> 1. Defendants will not admit liability *in this or any related case*. They are willing to bifurcate the claims and try the issue of damages alone if the plaintiffs are willing to forego any claim for punitive damages *in Florida or any other state*.
>
> 2. Petitioner is willing to forego all claims for punitive damages in return for the defendants not contesting liability.
>
> 3. Once the Stipulation and Agreement is signed by the attorneys for the various parties, it will serve as a stipulation to govern *any other action* brought as a result of the death of Jose L. Gresham, *whether it is in Florida or elsewhere* (emphasis added).

Shortly after the execution of the Stipulation and Agreement, Petitioner filed this action in the district court in South Carolina seeking recovery of those damages sustained by Mr. Gresham during his period of survivorship. Petitioner did

not attempt to duplicate the damages sought in the Florida state court action.

The district court later stayed the proceedings before it pending resolution of the Florida litigation. A jury verdict was rendered in the Florida wrongful death case on January 19, 1994. The South Carolina District Court case was then set for trial commencing September 12, 1994. On August 5, 1994, Defendants Amtrak and CSX filed motion for summary judgment arguing that the final judgment in the Florida action barred the South Carolina action. The district court granted the motion for summary judgment at a hearing on September 9, 1994 and entered a Minute Order and summary judgment on September 12, 1994 and September 13, 1994, respectively. Petitioners took a timely appeal therefrom.

The Circuit Court Proceeding:

Petitioner filed a timely appeal with the United States Court of Appeals for the Fourth Circuit. After the filing of briefs by all parties, the Circuit Court of Appeals issued a per curiam opinion affirming the district court on June 26, 1995. The Court of Appeals also denied a timely motion for rehearing on July 25, 1995.

REASONS FOR GRANTING THE WRIT

The district court and the court of appeals departed from the usual and accepted course of judicial proceedings by granting summary judgment in this case. The Stipulation and Agreement entered into by the parties in the Florida action clearly contemplated and allowed the South Carolina action as shown by the affidavits of Petitioner's counsel:

> 3. The subject agreement was executed by counsel on behalf of the plaintiff with the understanding that the defendants, while not admitting liability, would not contest liability and therefore the only issue for determination by the courts, both in Broward County and in South Carolina, would be the determination of damages sus-

> tained by the claimants in the two (2) cases. In return, plaintiff would not seek punitive damages in either case.
>
> 4. The Stipulation also specifically contemplated the bringing of two (2) separate actions, one in Florida and one in South Carolina. The language itself refers to "all actions brought as a result of Mr. Gresham's death".
>
> 5. . . . Moreover, it was clearly contemplated between the parties that plaintiff would seek recovery under the Florida Wrongful Death Act in Florida while at the same time bringing the survivor action before this court in South Carolina.

Petitioner's survival action was a recognition that there are two (2) distinctly different modern common law causes of action available in the event of death. The wrongful death action and survival action are designed to compensate for different kinds of loss. 2 S. Speiser Recovery in Wrongful Death, Section 14.1(2d ed. 1975 & Supp. 1990). "American Courts have painstakingly distinguished the two causes of action for many years." *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1285 (W.D.Pa. 1983), *aff'd without opinion* 738 F.2d 423, 426 (3d Cir. 1984), *cert. denied* 469 U.S. 858 (1984).

Although both causes of action may stem from the same tortious act, a wrongful death award compensates the estate or family members for the economic loss suffered as a result of the death, including loss of support and funeral expenses, whereas a survival action continues the person's own claim for injuries which accrued before death. 2 S. Speiser, Section 14.1.

A survival action, in other words, permits recovery by the decedent's personal representative, usually on behalf of the estate, for the damages that the decedent could have recovered had he lived. A survival action insures that a tortfeasor will not do better by killing rather than by simply injuring. Without a survival action, a defendant escapes liability for

personal injury or pain and suffering at the moment the injured plaintiff dies.

Florida does not recognize a survival action when a person dies as a result of a tortious act. However, South Carolina does, in the form of South Carolina Code Annotated, Section 15-5-90 (1976). Petitioner's Stipulation and Agreement was premised on the idea that Petitioner would thereby be able to pursue the South Carolina survival action in addition to the Florida Wrongful Death Act remedies, in order to fully recover for the damages which resulted from the Respondents' acts.

The Stipulation and Agreement specifically refer to actions brought in Florida *or elsewhere*. Clearly the agreement contemplated this action and was intended to govern it. In fact, Respondents have admitted that the Agreement governs this action. *See McNair and Sanford letter dated June 4, 1993.*

Since the Agreement extends to the South Carolina action, Respondents' agreement not to contest liability also extends to the South Carolina action. However, Respondents violated that agreement when they filed their motion for summary judgment seeking to avoid liability in the South Carolina action. The trial court erred in allowing Respondents to contest liability when they had waived that right in the Stipulation and Agreement.

No where in the Agreement did the Respondents reserve any right to contest their liability under the South Carolina survival statute, or attempt to deny Petitioner her right to a trial in South Carolina for such damages. In fact, the opposite is true. By expressly allowing suits both in Florida and in jurisdictions outside of Florida, they waived their right to contend, as they did in their motion for summary judgment, that Florida's statutory scheme was exclusive and preemptive.

Moreover, Respondents waived their right to assert res judicata by failing to raise it as an affirmative defense in their answer, as required by Fed. Rule of Civil Procedure 8. Likewise, Respondents' answers to the district court's interroga-

tories were devoid of notice of their intent to contest liability. Res judicata is an affirmative defense which must be affirmatively raised or otherwise waived. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-08 n. 19 (1975). Respondents waived their right to assert the defense of res judicata by not raising it timely, and more crucially, by bargaining away their ability to contest liability in exchange for Petitioner foregoing a right to recover punitive damages.

Since the Respondents waived their right to raise the defense of res judicata on the issue of choice of law, the district court was free to consider the conflict of law issue fresh. Clearly, under South Carolina law, conflict of law issue would have been decided under the principal of lex loci delicti *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E. 2d 303 (1964). As South Carolina's Supreme Court recently observed in *Dawkins v. State*, 306 S.C. 391, 393, 412 S.E. 2d 407, 408 (1991):

> "It is well established in South Carolina that in court cases, the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action, and the law of the forum with respect to matters pertaining to the remedy only."

Under the principal of lex loci delicti, clearly South Carolina law applied to this action. South Carolina law recognizes both a wrongful death action and a survival action as totally distinct legal creatures. They cannot be joined in one cause of action and must be tried separately, unless the defendant consents otherwise. *Bennett v. Spartanburg Railway Gas and Electric Company*, 97 S.C. 27, 81 S.E. 189 (1914). In fact, even had Petitioner *lost* the Florida Amtrak case, that defeat would not have been res judicata as to the South Carolina survival action. *Deaton v. Gay Trucking Company*, 275 F.Supp. 750, 753 (1967). As noted by the court in *Deaton*:

> For many years, separate actions for wrongful death and under the survival statute have been brought, and certainly the factual issues were the same, and yet the prior

determination has not been held to be binding on the subsequent case. In *Peeples, supra*, although the ultimate beneficiaries were not shown, this issue was presented and the South Carolina Supreme Court allowed the survival action although an earlier wrongful death action had resulted in a verdict for the defendant. In fact, under the South Carolina law, the two civil actions cannot be joined in one cause of action, and may not be tried together, except by consent of the parties, which necessarily invalidates defendants' argument.

Although the precise question involving the same ultimate beneficiaries, i.e., the grandparents, has not been presented, it appears from the South Carolina cases that the matter would not be res judicata, or estopped by judgment. Accordingly, the defendants' motion in this regard is denied. With a reference to May Belle Baalim Deaton and Lorena Dees Anderson, as Administratrices of the Estate of Sandra Lynn Kelly, deceased, Civil Action No. 67-395, and May Belle Baalim Deaton as Administratrix of the Estate of Shelly Martin Kelly, deceased, Civil Action No. 67-396, both of which involve actions for wrongful death, the question is not as well settled.

Generally, a distinct and independent civil action although growing out of the same state of facts may be sued on separately and the recovery of a judgment for one of such causes of action will not bar subsequent actions on the other. 50 C.J.S. Judgments 674.

The right of every man to his day in court is one of the most precious individual rights inherent in our form of government and basic to American jurisprudence. Assuming the correctness of the theory that each man is entitled to his day in court, it is completely contrary to this principle to allow one jury to decide another man's case. This would be the result if summary judgment were here granted for the defendants, since it would in fact be

having the jury of the prior case deciding the present case without even hearing it.

Although the issue was different, the case of *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 611, 93 S.E. 2d 912, 913, sheds some light on the feelings of the South Carolina Court on the matter. In discussing *Bennett, supra*, the court stated: "The administrator is, in reality, not the same party in respect of the two causes of action." Similarly, the administrator in each of these actions should be considered a totally different party. In the Bass case, plaintiff sought to recover for damages to his truck arising from a collision between plaintiff's truck and decedent's automobile. The executrix of the decedent pleaded the plaintiff's failure to counter-claim against her in her action for wrongful death barred the plaintiff's present suit.

The court stated that the distinction as executrix in her representative capacity went deeper than just to whom the proceeds of any recovery ultimately went, and further stated: "In reality, she functions under two separate and distinct trusteeship having no relationship to each other beyond the fact that their origin is referable to the death of the same person." And the court further states:

> "In the present case at least there is no res judicata because the parties in the Federal Court were not same as the parties in the present action. In the Federal Court, the administrator was necessarily sued in his capacity as the representative of the estate of the deceased for the benefits of creditors and distributees. But it is well settled that in bringing an action * * * based upon the death statute * * * for the benefit of the persons designated in this statute, the administrator acts in a different capacity and in the law of res judicata is not the same person as he is when the represents the estate in general." (229 S.C. at 613, 93 S.E. 2d at 915).

> The administratrix represents in each case a separate legal right that arose as to each decedent at the time of the accident.

Deaton, 275 F.Supp. at 753-54.

Deaton stands for the proposition that had Petitioners lost their case in Florida, the personal representative still would not have been barred from recovering on the survival action in South Carolina. Surely Petitioners should be no worse off by virtue of having won their Florida law suit.

As such, the Court of Appeals, as well as the District Court, erred in granting summary judgment in favor of Respondents AMTRAK and CSX. This Court should therefore exercise its power to correct the Court's departure from the usual and accepted course of judicial proceedings.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner AHMED

Dated: October 16, 1995

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOANN BENTON AHMED, a/k/a Joe Gresham, as personal representative of the Estate of Jose L. Gresham,
Plaintiff-Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; CSX TRANSPORTATION, INCORPORATED, a Virginia Corporation,
Defendants-Appellees.

No. 94-2438

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Dennis W. Shedd, District Judge.
(CA-92-2141-3-19)

Argued: May 2, 1995

Decided: June 27, 1995

Before WILKINSON and HAMILTON, Circuit Judges, and LIVELY, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Patrick Freeman, Columbia, South Carolina, for Appellant. William G. Ballaine, SIFF ROSEN, P.C., New York, New

York, for Appellees. **ON BRIEF:** Joseph J. Slama, Kelley Gelb, KRUPNICK, CAMPBELL, MALONE & ROSSELLI, P.A., Ft. Lauderdale, Florida, for Appellant. David J. Mills, MCNAIR & SANFORD, P.A., Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This appeal presents the question whether a Stipulation and Agreement entered by the parties barred appellees from asserting a *res judicata* bar to a survival action initiated in South Carolina district court following conclusion of a wrongful death action in Florida arising from the same set of facts. Because we think that assertion of a valid preclusion defense did not violate the terms of the Agreement, we affirm the district court's grant of summary judgment in favor of appellees.

I.

Jose L. Gresham, a Florida resident, was a passenger aboard an Amtrak passenger train headed from Florida to New York when the train derailed in South Carolina on July 31, 1991. Gresham was seriously injured in the derailment and was taken to a local hospital, where he died almost one month later as a result of complications arising from his injuries. Appellant Joann Benton Ahmed, Gresham's oldest child and the personal representative of his estate, brought a wrongful death action in Florida state court in January 1992, seeking compensatory damages arising from Gresham's death on behalf of his seven adult children and his estate. Named as defendants were appellees National Railroad Passenger Corporation ("Amtrak") and CSX Transportation, Inc. While the Florida litigation was pending, Gresham's estate and defendants entered into a Stipulation and Agreement

dated July 9, 1992, in hopes of "resolv[ing] the matter on an expedited basis." The Agreement provided, in pertinent part:

> 1. Defendants will not admit liability in this or any related case. They are willing to bifurcate the claims and try the issue of damages alone, if the Plaintiffs are willing to forego any claim for punitive damages in Florida or any other State.
>
> 2. Plaintiffs are willing to forego all claims for punitive damages in return for the Defendants not contesting liability.
>
> 3. Once this Stipulation and Agreement is signed by the attorneys for the various parties, it will serve as a Stipulation to govern any action brought as a result of the death of Jose L. Gresham, whether it be in Florida or elsewhere.
>
> . . .
>
> 5. Defendants reserve the right to contest all issues with respect to damages and causation.

On July 28, Ahmed brought the instant survival action against Amtrak and CSX in federal district court in South Carolina pursuant to S.C. Code Ann. § 15-5-90, seeking to obtain damages for Gresham's conscious pain and suffering from the date of the accident until the date of his death as well as medical bills and funeral expenses. Defendants filed an answer but did not at that time raise *res judicata* as an affirmative defense. On April 15, 1993, however, defendants filed a motion to dismiss or, in the alternative, to stay the South Carolina action pending the outcome of the Florida litigation. Defendants specifically accused the plaintiff of an "improper effort" to litigate the same issues in two separate forums and insisted that any survival action claims should have been raised in the Florida court. The South Carolina district court denied the motion to dismiss but did stay the proceedings pending resolution of the Florida litigation.

In January 1994, the Florida lawsuit resulted in a final judgment awarding the Gresham estate $42,500 and each of the surviving children $400,000, for a total award of $2,842,500.* This award represented all damages recoverable under the Florida Wrongful Death Act, Fla. Stat. § 768.16 *et seq.* The Florida Act in effect consolidates into a single lawsuit both a survival action for personal injuries and a wrongful death action so as to avoid a multiplicity of suits. *Martin v. United Security Services, Inc.*, 314 So.2d 765, 768-70 (Fla. 1975). The Act provides no recovery for damages arising from the decedent's conscious pain and suffering between the date of injury and the date of death, which are typically encompassed within a "survival" action. Instead, the Florida Act permits recovery of damages for the individual pain and suffering of surviving close relatives. *Id.* at 769.

The South Carolina action was set for trial commencing in September 1994. On August 5, however, the defendants moved for summary judgment based on the preclusive effect of the $2.8 million final judgment entered in Florida state court. The defendants insisted that, under applicable Florida law, the subsequent South Carolina survival action would be barred by principles of *res judicata*. Ahmed opposed the motion, relying on the Stipulation and Agreement, which, she insisted, waived defendants' right to contest her right to recover under the South Carolina survival statute. In essence, she claimed that defendants' assertion of a *res judicata* defense amounted to "contesting liability" in violation of the Agreement.

Following a hearing in early September, the district court granted defendants' motion, reasoning that Florida law would require dismissal of appellant's survival action claim and that the Agreement did not bar defendants from raising the issue of *res judicata* in the South Carolina proceedings. Ahmed now appeals.

---

*Defendants appealed the final judgment to Florida's intermediate appellate court, but under Florida law, the judgment is *res judicata* notwithstanding the pending appeal. *See Reese v. Damato*, 33 So. 462, 464 (Fla. 1902). At oral argument, counsel for appellees informed the court that the Florida intermediate court of appeals had affirmed the judgment. Appellees have sought rehearing in that court.

II.

Ahmed's contention that the South Carolina action was not barred by principles of *res judicata* is premised wholly upon the effect of the Stipulation and Agreement. In fact, Ahmed's counsel acknowledged before the district court that Florida law, which applies to determine the preclusive effect of the final judgment in the wrongful death action, would bar the subsequent survival action absent the Agreement. Counsel likewise conceded that the Agreement would not bar assertion of a *res judicata* defense to multiple wrongful death actions pursued outside Florida or multiple survival actions pursued in other fora. Ahmed nonetheless insists that the Agreement specifically preserves her right to pursue this survival action in South Carolina, in order to achieve a full recovery of the damages resulting from appellees' acts.

We cannot accept appellant's reading of the Agreement. It is not plain, as appellant argues, that the Stipulation and Agreement contemplated two separate actions in Florida and South Carolina courts. Rather, we think appellees' reading of the Agreement equally plausible: the references to litigation in "any other state" intended simply to ensure that plaintiff would not be able to nullify the Agreement by dismissing the Florida action and seeking relief in another forum.

In any event, we do not believe the Agreement can be read to prohibit defendants from raising a meritorious *res judicata* defense to Ahmed's attempt to recover damages in multiple actions in multiple fora arising from a single accident. Had the parties wished to preclude defendants from advancing a *res judicata* defense in the event Ahmed instituted a second action in another forum, they were free to draft an Agreement that clearly provided for this waiver. The parties did not do so, however, and we decline Ahmed's invitation to read the Florida Stipulation as if they had. The parties' intent as expressed in the unambiguous Agreement is controlling, regardless of any intention purportedly existing in their minds at the time of contracting. *Stokes v. Victory Land Co.*, 128 So. 408, 410 (Fla. 1930).

Appellees note that the Agreement expressly reserved their right to contest all issues as to damages and causation. Assertion of a meritorious *res judicata* defense amounts to no more than an insistence that

Ahmed be precluded from collecting damages twice from the same defendants for the same accident. In fact, appellees' affirmative *res judicata* defense essentially admits liability, but contends that the question has already been addressed and determined in the Florida proceeding.

Absent the Agreement, it is clear that Florida law bars Ahmed's separate survival action. The preclusive effect of a state court's judgment is determined by reference to the law of the rendering state, rather than the law of the state where a subsequent action is commenced. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (federal courts must give state-court judgments same preclusive effect as would be given under law of rendering state); *Mears v. Town of Oxford, Md.*, 762 F.2d 368, 371 (4th Cir. 1985); 28 U.S.C. § 1738. Nor is this result unsound. Ahmed was free to request the Florida court to apply the South Carolina survival statute in addition to, or in lieu of, the Florida Wrongful Death Act, but declined to do so. The Florida judgment binds appellant as to previously available claims, such as the South Carolina survival act claim, "regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *see also Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43 (4th Cir. 1990); *In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816-17 (5th Cir. 1988). We express no view on the Florida court's likely resolution of this choice of law question. We do note, however, that application of the Florida Wrongful Death Act by the Florida court resulted in a generous recovery for Gresham's children.

III.

Ahmed argues in the alternative that defendants have waived their right to assert *res judicata* as a bar to the South Carolina action by failing to timely assert it as an affirmative defense in their answer to her survival action complaint. *See* Fed. R. Civ. P. 8(c). We cannot agree. Defendants' April 1993 motion to dismiss or stay the South Carolina action pending resolution of the Florida litigation provided Ahmed with ample notice that defendants intended to contest the South Carolina litigation as duplicative. Specifically, defendants referred to the South Carolina action as an "improper effort to litigate these issues twice" and insisted that the survival action claim "could

have, and should have been brought along with the wrongful death action in Florida." Ahmed thus cannot establish the prejudice necessary to preclude defendants from raising this issue following a modest delay. *See, e.g., Defender Indus., Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 508 (4th Cir. 1991) (mere delay, when unaccompanied by actual prejudice, bad faith, or futility, does not justify denial of leave to amend answer to assert affirmative defense), *cert. denied*, 113 S.Ct. 3038 (1993). Moreover, as defendants note, there was no basis for asserting *res judicata* prior to entry of the Florida final judgment in January 1994. Strictly speaking, then, defendants could not have raised this issue in their answer, which was filed in August 1992.

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED SEPTEMBER 13, 1994
CASE NO. 3:92-2141-19

JOANN BENTON AHMED, as personal representative of the Estate of Jose L. Gresham, a/k/a Joe Gresham,

Plaintiff,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation and CSX TRANSPORTATION, INC., a Virginia Corporation,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The defendants' motion for summary judgment having been duly heard and granted,

IT IS ORDERED AND ADJUDGED that summary judgment is entered for the defendants.

LARRY W. PROPES
Clerk

/s/ NANCY G. RUMCHAK
Nancy G. Rumchak
(By) Deputy Clerk

September 13, 1994
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED SEPTEMBER 13, 1994
CASE NO. 3:92-2141-19

JOANN BENTON AHMED, as personal representative of the Estate of Jose L. Gresham, a/k/a Joe Gresham,

Plaintiff,

—VS.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corp., and CSX TRANSPORTATION, INC., a Virginia Corporation,

Defendant.

MINUTE ORDER

This matter was before the Court upon defendants' motion for summary judgment.

For the reasons stated by the Court at the conclusion of oral argument, the defendants' motion is granted.

IT IS SO ORDERED.

BY DIRECTION OF THE COURT

LARRY W. PROPES, CLERK

BY: NANCY G. RUMCHAK
Deputy Clerk

Columbia, South Carolina
September 12, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED
October 4, 1994

C.A. No. 3:92-2141-19

JOANN BENTON AHMED, as Personal Representative of the Estate of JOSE L. GRESHAM, a/k/a JOE GRESHAM,

Plaintiff,

—vs.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; and CSX Transportation, Inc., a Virginia Corporation,

Defendants.

ORDER

This matter is before the Court on plaintiff's motion for a new trial and/or for reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure.[1] After carefully reviewing the record and the controlling legal principles, the Court con-

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[1] Although the Federal Rules of Civil Procedure do not provide for a motion for reconsideration, the caselaw makes clear that such a motion filed within ten days of the entry of judgment is to be considered as a motion to alter or amend the judgment under Rule 59(e). *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992); *Boyle v. Chicago Housing Authority*, 946 F.2d 54, 56 (7th Cir. 1991).

cludes that the motion for a new trial and/or reconsideration should be DENIED.

IT IS SO ORDERED this 4th day of October, 1994, at Columbia, South Carolina.

/s/ DENNIS W. SHEDD
Dennis W. Shedd
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 25, 1995

No. 94-2438
CA-92-2141-3-19

JOANN BENTON AHMED, a/k/a Joe Gresham, as personal representative of the Estate of Jose L. Gresham,

Plaintiff-Appellant

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), a District of Columbia Corporation; CSX TRANSPORTATION, INCORPORATED, a Virginia Corporation,

Defendants-Appellees.

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ BERT M. MONTAGUE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 2, 1995

No. 94-2438
CA-92-2141-3-19

Ahmed v. National Railroad

MANDATE

The judgment of this Court dated 6/27/95 takes effect today.

BERT M. MONTAGUE
CLERK

Supreme Court, U.S.
FILED
NOV 21 1995
OFFICE OF THE CLERK

No. 95-651

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOANN BENTON AHMED,
a/k/a Joe Gresham, As Personal Representative
for the Estate of Jose L. Gresham,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) a District of Columbia Corporation;
CSX TRANSPORTATION, INCORPORATED,
a Virginia Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this case is of such imperative public importance as to justify deviation from normal appellate practice, where the Fourth Circuit Court of Appeals properly affirmed the dismissal of petitioner's survival action claim, on the ground that petitioner's action was precluded by a final judgment entered in an action in another court, in which the same petitioner was awarded damages exceeding $2.8 million dollars from the same defendants for the same damages claim arising from the exact same set of facts.

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NO. 95-651

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOANN BENTON AHMED,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK); CSX TRANSPORTATION, INCORPORATED,

Respondents.

BRIEF IN OPPOSITION

Respondents, NATIONAL RAILROAD PASSENGER CORPORATION ("AMTRAK") AND CSX TRANSPORTATION, INCORPORATED (collectively "defendants" or "respondents"), respectfully request that this Court deny petitioner's request for a writ of certiorari to review the Fourth Circuit Court of Appeals' opinion below. The opinion, dated July 27, 1995, is reprinted in the petition for certiorari at Appendix 1a.[1]

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[1] "Appendix" refers to the appendix to the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to S.C. Code Ann. § 15-5-90, cited in the petition for certiorari, this matter also involves Florida's Wrongful Death Act, Fla. Stat. ch. 768.16, *et seq.* Specifically, ch. 768.20 of Florida's Wrongful Death Act provides:

> The [wrongful death] action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified by this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

Fla. Stat., ch. 768.20 (West 1994).

STATEMENT OF THE CASE

On January 13, 1992, Joann Benton Ahmed ("petitioner" or "Ahmed"), decedent's oldest child, instituted an action in Florida state court (the "Florida action"), charging respondents Amtrak and CSX with negligence and seeking compensatory damages in connection with an accident involving a train derailment on July 31, 1991 that resulted in the death of Jose L. Gresham, petitioner's father. Proceeding under Florida's Wrongful Death Act, Fla. Stat. ch. 768.16, *et seq.*, Ms. Ahmed sued as Florida-appointed representative of both the

decedent's estate and the decedent's survivors, his seven adult children.

It was undisputed below that under Florida's Wrongful Death Act, when injury from a wrongful act or negligence results in death, Florida vests in one individual, the personal representative of the decedent's estate, the right and duty to pursue all damages in a single action covering all potential claims for relief on behalf of the estate and designated survivors. Fla. Stat. ch. 768.20. See *In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816-818 (5th Cir. 1988); Wilcox and Melville, THE COMPUTATION OF DAMAGES UNDER THE NEW WRONGFUL DEATH ACT, 26 U. Miami L. Rev. 737, 738 (1972). Florida's Wrongful Death Act, in effect merges or consolidates into one lawsuit both a survival action for personal injuries and a wrongful death action so as to avoid a multiplicity of suits. *Martin v. United Security Services, Inc.*, 314 So. 2d 765, 768-770 (Fla. 1975); *McKibben v. Mallory*, 293 So. 2d 48, 54 (Fla. 1974). (*See* JA 132-134, 207-212).[2]

On July 9, 1992, while the Florida litigation was pending, counsel for the parties to the Florida action executed a stipulation and agreement (the "Florida stipulation"), in order "to resolve the matter on an expedited basis." It was agreed that the plaintiffs would "forego any claim for punitive damages in Florida or any other State" in return for which respondents would not contest liability. The stipulation made clear that respondents still could "contest all issues with respect to damages and causation." The stipulation was to govern

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[2] "JA" refers to the joint appendix filed by the parties in the Fourth Circuit Court of Appeals in the appeal below.

"any action brought as a result of the death of Jose L. Gresham, whether it be in Florida or elsewhere." (JA 193-194)

On July 28, 1992, Ms. Ahmed, again acting as the estate's representative, commenced a second action in federal district court in South Carolina (the "South Carolina action"), charging the same defendants with negligence based on the same accident (JA 9-14, JA 20-25). This time petitioner purported to proceed under South Carolina's Survival Action Statute, S.C. Code Ann. § 15-5-90, for recovery of compensatory damages covering the decedent's conscious pain and suffering from the time of the accident until his death, as well as decedent's medical bills and funeral expenses (JA 9-14, JA 20-25).

Although respondents' answer did not specifically assert an affirmative defense based on the existence of the Florida action (see JA 26-29), respondents moved in April, 1993 to dismiss or stay the South Carolina action based on the pendency of the duplicative Florida action (JA 36-42). Respondents' moving papers specifically accused petitioner of an "improper effort to litigate" the same issues in two different forums and insisted that petitioners "could have, and should have" brought any survival action claims in Florida (JA 39, 40). Petitioner opposed respondents' dismissal motion, alleging that South Carolina, unlike Florida, had a Survival Statute (JA 63-65). Without explaining why this might be so, petitioner argued that "[t]he survival cause of action needs to be asserted . . . in South Carolina" (JA 64). Petitioner did not, however, oppose a stay of the South Carolina action pending entry of a judgment in the Florida action (JA 63). As a result, by Order dated June 10, 1993, the district court below stayed the South Carolina action "pending a resolution of the Florida litigation" (JA 89).

At no time after the stay of the South Carolina action in June, 1993 did petitioner ask the Florida state court to allow her to pursue recovery for decedent's pain and suffering based on South Carolina's Survival Statute. In the Florida action, she relied solely on Florida's Wrongful Death Act, which clearly prohibits such a recovery (JA 166-167, 175-181).

The Florida action was tried before a jury, and resulted in a final judgment which was entered in January 1994, awarding petitioner compensatory damages totalling $2,842,500, consisting of $42,500 for Mr. Gresham's estate and $400,000 for each of his seven children.

In early August 1994, respondents moved for summary judgment in the South Carolina action based on the preclusive effect of the $2.8 million judgment in the Florida action (JA 121-124). Respondents' motion papers below explained why full faith and credit principles required the application of Florida's law on *res judicata* and that, under Florida law, petitioner's separate survival action claim was barred, requiring dismissal of the South Carolina action (JA 123-139).

Petitioner's opposition did not contest respondents' analysis of full faith and credit and *res judicata* principles, but simply argued that: (1) respondents were barred from making the dismissal motion in the South Carolina action because of the Florida stipulation; (2) respondents waived their rights by not asserting *res judicata* as an affirmative defense; and (3) assuming South Carolina law applied, rather than Florida law, petitioner was entitled to pursue separate wrongful death and survival action claims (JA 141-149). To support petitioner's assertion as to the preclusive effect of the Florida stipulation, petitioner cited, as she does in her petition for certiorari, a self-serving affidavit of her Florida counsel purporting to

explain what the stipulation "contemplated" (Petition at 4-5; JA 143-144, 150-151, 157-159).[3]

On September 9, 1994, the district court held oral argument on respondents' motion for summary judgment (JA 205-253). During argument, the court elicited the following concessions from petitioner's counsel:

> **THE COURT:** Under the full faith and credit clause. . . I would have to look to the state of the final judgment to determine how they would apply that final judgment.
>
> **MR. FREEMAN:** That's correct. No. That's correct. We researched that, and we agree that Florida law would apply.
>
> **THE COURT:** So . . . you do agree with me that the Florida court, looking at its own final judgment in the wrongful death action, would dismiss a survival action like this brought in Florida?
>
> **MR. FREEMAN:** That's what the cases appear to indicate, Your Honor. (Emphasis added) (JA 211-212).

After hearing petitioner argue that the Florida stipulation barred respondents' *res judicata* motion, on the theory that to assert such a defense amounted to contesting liability, the

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[3] "Petition" refers to Ahmed's petition for certiorari.

district court had the following exchange with petitioner's counsel:

> **THE COURT:** . . . [N]ow you claim that when they come in to indicate to me you may not pursue your survival action, your survival action as a plaintiff, you say that is contesting liability.
>
> **MR. FREEMAN:** It is.
>
> **THE COURT:** So my question is, what happened [if] instead of filing the subsequent survival action in South Carolina, you just filed a wrongful death action in South Carolina . . . . If they came in and told me that full faith and credit applied, [do] you think that would be contesting liability?
>
> **MR. FREEMAN:** No, Your Honor, I don't. (Emphasis added) (JA 221).

The court later returned to the obvious analytical defect in petitioner's argument:

> **THE COURT:** . . . I understood you earlier to say that under the agreement these defendants could contest your bringing a wrongful death action in South Carolina.
>
> **MR. FREEMAN** : I think that.
>
> **THE COURT:** . . . What in the agreement would you say they cannot challenge you on the

> survival action, but they may challenge you on the wrongful death action?
>
> **MR. FREEMAN:** The agreement doesn't differentiate wrongful death and survival [sic]. Those terms are not in the agreement. (Emphasis added) (JA 244).

Petitioner's flawed argument faired no better when the district court approached the matter in a slightly different way:

> **THE COURT:** What in the agreement allows you to bring one survival action but not a second survival action? What in the agreement does that?
>
> **MR. FREEMAN:** Just - it is not in the Agreement. It is just in common sense, Your Honor. (Emphasis added) (JA 246).

Ultimately, petitioner's counsel explained simply that "you couldn't bring multiple wrongful death actions, because I don't believe . . . the outcome was in the contemplation of the parties when this [stipulation] was entered into." In response, the district court observed that "you don't get to the contemplation of the parties unless there's some ambiguity in the agreement." (JA 247).

In summarizing petitioner's position at the conclusion of the argument, the district court observed that it was "completely inconsistent" for petitioner to concede that *res judicata* could be asserted to defend against multiple wrongful death actions or to defend against multiple survival actions but could not be asserted to bar the particular survival action

petitioner had pursued, even though Florida law would bar just such an action (JA 248).

The district court thereupon granted summary judgment, concluding that as a matter of law, full faith and credit required the district court to look at the South Carolina action as the Florida court would and the Florida court would dismiss petitioner's separate survival action claim (JA 251). The district court further held that the Florida stipulation was not ambiguous on the issue of whether respondents had waived their *res judicata* defense and did not bar them from asserting this defense (JA 251-252).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's judgment. The court of appeals held that the South Carolina action was barred by Florida law and that under principles of *res judicata* summary judgment properly was granted. The court of appeals also held that the Florida stipulation was unambiguous and did not serve to prohibit respondents from asserting such a defense:

> Had the parties wished to preclude defendants from advancing a *res judicata* defense in the event Ahmed instituted a second action in another forum, they were free to draft an Agreement that clearly provided for this waiver. The parties did not do so, however, and we decline Ahmed's invitation to read the Florida Stipulation as if they had. The parties' intent as expressed in the unambiguous Agreement is controlling, regardless of any intention purportedly existing in their minds at the time of contracting. (Appendix 5a) (citation omitted).

Finally, the court of appeals found no actual prejudice to petitioner due to respondents' failure to assert the *res judicata* defense in their answer to the complaint (Appendix 6a). Petitioner later filed a petition for rehearing which the court of appeals denied (Appendix 10a-11a).

REASONS FOR DENYING THE WRIT

The district court did not depart from accepted and usual course of judicial proceedings, and the court of appeals did not remotely sanction such a departure by affirming the district court's judgment. Having recovered a judgment exceeding $2.8 million in the Florida action, petitioner cannot escape the application of full faith and credit and *res judicata* principles. Petitioner's contrary arguments are devoid of merit.

First, petitioner persists in claiming that when respondents agreed in the Florida stipulation not to "contest" liability, either "in Florida or elsewhere," respondents waived their right to assert a meritorious *res judicata* defense in the South Carolina action (see Petition at 4-6). The Florida stipulation, however, expressly reserved respondents' right to contest "all issues with respect to damages and causation" (emphasis added).

Petitioner's counsel repeatedly conceded below that the stipulation did not prevent respondents from contesting petitioner's right to assert either multiple wrongful death claims or multiple survival claims. These concessions implicitly acknowledged that a meritorious *res judicata* defense goes well beyond the narrow issue of contesting liability. It goes to the broader issue of whether a plaintiff may go from forum to

forum in an effort to reap repeated damage recoveries for the same accident.

Notably, when asked to reconcile petitioner counsel's concessions during argument with her "waiver" argument, petitioner's counsel was unable to cite to a single word in the Florida stipulation supporting her position and spoke instead of the so-called "contemplation of the parties." Moreover, petitioner has never pointed to any law -- in Florida or elsewhere -- suggesting that the Florida stipulation should be construed, not on the basis of its words, but on some self-serving, after-the-fact expression of what the agreement supposedly contemplated. Florida law, in fact, rejects any such proposition. Under Florida law, as in most, if not all other jurisdictions, the court must look first to the words in the contract, and absent an ambiguity, the actual language used is the best evidence of the intent of the parties and the plain meaning of that language controls. *Acceleration Nat'l Serv. Corp. v. Brickell Financial Serv. Motor Club*, 541 So. 2d 738, 739 (Fla. 3d DCA 1989) (and cases cited therein), *review denied*, 548 So. 2d 662 (Fla. 1989); *Boat Town U.S.A. v. Mercury Marine Division of Brunswick Corp.*, 364 So. 2d 15, 17 (Fla. 4th DCA 1978) (and cases cited therein). In Florida, contract provisions should be given their natural and most commonly understood meaning in the light of the subject matter and circumstances, and the language used should be read in common with the other contract provisions. *Gibbs v. Air Canada*, 810 F. 2d 1529, 1533 (11th Cir. 1987) (and Florida cases cited therein). *See also Int'l Erectors, Inc. v. Wilhoit Steel Erectors and Rental Serv.*, 400 F.2d 465, 467-468 (5th Cir. 1968) (and Florida cases cited therein). The parties' intention, as expressed in the contract, is controlling, regardless of the intention purportedly existing in the minds of

the parties. *Stokes v. Victory Hands Co.*, 128 So. 408, 410 (Fla. 1930).

The intent of the parties, as revealed in the Florida stipulation, is readily apparent and completely contradictory to petitioner's self-serving argument in her petition. Since "the parties [wanted] to resolve the matter on an expedited basis," respondents agreed not to contest negligence in connection with the July 31, 1991 derailment and petitioners, in exchange, agreed not to pursue a punitive damages claim (JA 85-86). Since the Florida action had only recently been commenced (see JA 85-86, 166), the stipulation sensibly protected against petitioner potentially nullifying the agreement by dropping the Florida action and starting all over again in another forum; it stated that the Florida stipulation would "govern any action brought as a result of the death of Jose L. Gresham whether it be in Florida or elsewhere" (emphasis added) (JA 86). At the time this stipulation was executed, however, there was no second action pending and the stipulation neither expressly contemplates a second action (in South Carolina or elsewhere), nor does it hint that the parties intended specifically to permit petitioner to recover damages under the laws of two different states in two different actions, notwithstanding applicable principles of *res judicata*.[4]

---

[4] The stipulation, for example, does not say it will govern "all actions" brought in Florida "and elsewhere", let alone specifically refer to a contemplated South Carolina action to be pursued in tandem with, not instead of, the Florida action. Moreover, it would be odd for the stipulation to contemplate resolution of the dispute on an "expedited" basis, and yet also contemplate that petitioner would institute a second action in another forum and also be entitled to pursue that second action to judgment, notwithstanding a meritorious *res judicata* defense.

The Florida stipulation was executed by competent counsel. There is no great challenge to drafting a stipulation stating that respondents agreed to give up a *res judicata* defense in the event that petitioners were to start a second action in South Carolina. As the court of appeals observed, "[h]ad the parties wished to preclude defendants from advancing a *res judicata* defense in the event Ahmed instituted a second action in another forum, they were free to draft an Agreement that clearly provided for this waiver." (Appendix 5a). The stipulation, however, by its silence, reveals that the parties made no such agreement.

Moreover, Florida's legislature has clearly directed, as a matter of public policy, that a personal representative of a decedent's estate, like Ms. Ahmed, must pursue all damage claims in a single action. Fla. Stat. ch. 768.16, *et seq. See, e.g., Martin*, 314 So. 2d at 768-770; *McKibben*, 293 So. 2d at 54; *Florida Clarklift, Inc. v. Reutimann*, 323 So. 2d 640, 641 (Fla. 2d DCA), *cert. denied*, 336 So. 2d 1181 and 341 So. 2d 293 (Fla. 1976). *See also In re Air Crash*, 861 F.2d at 816-817. This Florida law made it even more incumbent on petitioner's counsel in the Florida action to clearly set forth any purported agreement whereby respondents would allow the Florida-appointed representative to pursue duplicative actions. Petitioner's counsel did no such thing.

The Florida stipulation in question is not ambiguous on the issue of *res judicata*. It does not remotely bar respondents from challenging petitioner's right to recover duplicative damages in two actions, notwithstanding Florida law that would bar a second action in South Carolina. By admitting that respondents are entitled to defeat multiple wrongful death actions and multiple survival actions, petitioner's counsel effectively conceded the meritlessness of her position.

Equally flawed is petitioner's contention that respondents waived their right to assert a *res judicata* defense by not setting it forth in their answer or interrogatory responses (*see* Petition at 6-7). It is well settled that amendments to pleadings are freely given when justice so requires. *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See Island Creek Coal Co. v. Lake Shore Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (reversing district court's refusal to allow amendment in three-year old case when motion made several months before trial). Mere delay, unaccompanied by actual prejudice, bad faith, or futility, does not justify denying leave to amend. *Defender Ind., Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 508 (4th Cir. 1991). Absent prejudice, an amendment may even be granted during trial, after the close of petitioner's evidence. *Id.*

Here the district court had ample discretion to permit respondents' *res judicata* defense, particularly since petitioner received notice of the issue in April 1993 and never once alleged, or demonstrated, that she had been prejudiced by respondents' failure to raise this defense earlier. *See, e.g., Defender Ind. Inc.*, 938 F.2d at 508. Indeed, nothing Ahmed argues in her petition even addresses, let alone casts doubt on, the district court's ample discretion to permit a meritorious *res judicata* defense under the circumstances reflected by the record below.

Petitioner attempts to explain why her Florida action and her South Carolina action should not be viewed as duplicative by this Court (Petition at 5-6). This discussion, however, is irrelevant. Petitioner has conceded that under governing Florida law petitioner's judgment in the Florida action is *res judicata* with respect to petitioner's claims in the South Carolina action.

Finally, there is no merit to petitioner's argument that the lower court was "free" to apply South Carolina law, which she asserts would permit a separate survival action (Petition at 7-10). As petitioner's brief acknowledges, this argument rests on the faulty premise that respondents waived their meritorious *res judicata* defense (Petition at 7). There was no waiver.

Under well-settled law, which petitioner does not dispute, the determination of whether a state's judgment is preclusive is determined by reference to the law of the state where the judgment was rendered, not the law of the state where the second action is commenced. *Migra v. Warren City School Dist. Board of Ed.*, 465 U.S. 75, 81 (1984). *See Mears v. Town of Oxford, Md.*, 762 F.2d 368, 371 (4th Cir. 1985); *Sea Cabin v. City of North Myrtle Beach*, 828 F. Supp. 1241, 1248-1249 (D.S.C. 1993). This requirement applies with equal force when the second action is commenced in federal court based on diversity jurisdiction. *See, e.g., Radle v. Allstate Insur. Co.*, 758 F. Supp. 1464, 1467 (M.D. Fla. 1991) (Florida federal court applies Wisconsin law to determine preclusive effect of prior Wisconsin state court action). Florida law, therefore, not South Carolina law, determines the preclusive effect of the Florida judgment, and petitioner has conceded that under Florida law, her separate survival action would be barred by *res judicata*.

The petitioner could have asked the Florida court to apply South Carolina's Survival Statute in lieu of, or in addition to, Florida's Wrongful Death Act. *See, e.g., In re Air Crash*, 861 F.2d 814; *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d DCA 1981). But she did not. It is readily apparent why petitioner chose not to pursue that legal tack in the Florida action. At oral argument below, petitioner conceded that if she had pursued a survival action in

Florida based on South Carolina law, it would have been dismissed (JA 210-212).

Petitioner's concession was not surprising given the parade of cases demonstrating that the Florida state court, applying the "significant relationships test", would have flatly rejected the application of out-of-state law and would have applied only Florida's Wrongful Death Act. *See, e.g., Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983), *reh'g denied, Valsecchi v. Proprietors Ins. Co.*, 449 So. 2d 265 (Fla. 1984), *appeal after remand, Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310 (Fla. 1987) (Florida law applied to wrongful death of Florida residents who died in North Carolina plane crash); *Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d DCA 1983) (Florida Law applied to wrongful death of Florida residents who died in Maine auto accident); *Steele v. Southern Truck*, 397 So. 2d 1209 (West Virginia wrongful death laws applied where West Virginia resident died in this state even though respondent's principal place of business was in Florida and alleged negligence occurred in Florida). *Cf., In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106, 1119 (D. Mass. 1975) (Florida has paramount interest in applying its Wrongful Death Act where Florida resident was killed in Massachusetts air crash). Rather than raise the choice-of-law issue in Florida, and face certain failure, petitioner decided to slice her personal injury claims into two convenient pieces and dash into South Carolina district court, even as she proceeded to final judgment in the Florida action.

The law is not so easily twisted to suit a litigant's convenience. Under full faith and credit and *res judicata* principles, respondents were entitled to dismissal of petitioner's South Carolina action. Petitioner's vain attempt to

escape that result by claiming waiver was properly rejected by the district court, and the court of appeals was entirely correct to affirm the district court's judgment.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 17, 1995